

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219896

DATE: October 8, 1985

MATTER OF: Potomac Systems Resources, Inc.

DIGEST:

1. Before the issue of possible government mishandling of a late best and final offer can be considered, the time of receipt at the government installation must be established, and a protester has not shown that its best and final offer was tendered to agency personnel on time when it says only that its representative conversed with the agency's procurement assistant for a few minutes before the offer was time-stamped 6 minutes late.
2. An agency reasonably may conclude that an offeror has not agreed to the solicitation's 120-day delivery requirement where the offeror's latest acceptable submission is equivocal with respect to a firm delivery date.
3. Protest alleging that an offeror does not qualify as a regular dealer under the Walsh-Healey Public Contracts Act is dismissed because an agency's determination concerning the status of an offeror under that act is subject to review by the Small Business Administration (if a small business is involved) and the Department of Labor, not GAO.

Potomac Systems Resources, Inc., protests the award of a contract by the National Bureau of Standards to Telegraphics, Inc., under request for proposals (RFP) No. SB85NBS0058. The protester contends that it was entitled to the award as the low offeror, but that the agency concluded improperly both that the firm's third best and final offer was late and that its proposal did not otherwise contain a firm commitment to comply with

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the required delivery date. The protester also questions the certification by Telegraphics that it is a regular dealer in the equipment to be supplied under the contract. We deny the protest in part and dismiss it in part.

The RFP sought offers to provide a Charles River Data Systems Universe UV2403FT-E computer system, peripheral equipment, software, and software updating services. The solicitation, which the agency issued on March 27, 1985, stated that a firm, fixed-price aggregate award would be made to that responsible offeror whose offer conforming to the requirements of the solicitation was "most advantageous to the government, price and other factors considered." As originally issued, the solicitation required delivery of all items except the software updating within 60 days after award of the contract.

The agency received two proposals in response to the RFP, from Potomac Systems and Telegraphics, both of which the agency considered to be in the competitive range. The agency addressed questions to each offeror and invited them to submit best and final offers by May 23. Both firms submitted timely best and final offers, but since Telegraphics did not sign its submission, the agency did not consider it. Potomac's offer was not acceptable because the firm promised delivery by October 30 and did not commit itself to comply with the solicitation's 60-day delivery requirement.

Since the agency had not received an acceptable offer, it requested a second round of best and final offers from both Telegraphics and Potomac. Offers were due by June 11. Telegraphics' response was late and therefore was not considered. Potomac submitted a timely response in which it first said that it would meet the 60-day delivery requirement, but then referred to a modification to the computer system that Charles River Data Systems apparently was just about to complete and cautioned, "if all does not go well there may be some reasonable delay, although not of an injuriously long extent." The agency regarded Potomac's response as too equivocal to constitute a firm delivery commitment and, still having no acceptable proposal before it, initiated a third round of best and final offers. This time, the agency lengthened the required delivery period to 120 days after award. The agency invited both Potomac and

Telegraphics to submit revised proposals by 3 p.m., June 21. As had all prior requests, the notice advised the firms that the late submissions provision of the RFP applied.

Telegraphics submitted a timely response that eliminated all terms from its proposal that the agency had found objectionable and promised delivery within 60 days. Potomac's best and final offer, which the firm's president delivered by hand on June 21, was time-stamped 3:06 p.m. The submission stated that Potomac would comply with the 120-day delivery requirement. The agency did not evaluate Potomac's submission, however, because it was late; it made award to Telegraphics, the only firm that agreed unequivocally to comply with the delivery requirement of the solicitation as amended. The award to Telegraphics was for \$27,604. Potomac had offered to perform the contract for \$27,290. Potomac filed a protest with the agency, which the agency denied.

Potomac has raised three issues in its protest to this Office. First, Potomac implies in its protests here and to the agency that its third best and final offer in fact was not late because, as the firm said in its protest to the agency, its president had "chatted with the [agency's] secretary for a few minutes" prior to the time when the submission was time-stamped. The protester says this conversation could have lasted 2, 4, or even 6 minutes. The protester argues that the rule regarding late proposals should not be applied strictly in a negotiated procurement in which there had been two previous best and final submissions. Second, Potomac contends that even if its third best and final offer is disregarded, its previous submissions establish its intent to deliver within 120 days of July 3, the date the agency actually awarded the contract. Finally, Potomac questions the certification by Telegraphics under the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 et seq. (1982), that it is a regular dealer in the equipment it offered to supply.

We can find no reason for objecting to the agency's conduct of this procurement. A proposal modification received after the time set for receipt of best and final offers generally may be considered only under the

circumstances stated in the solicitation. See Woodward Associates, Inc., et al., B-216714, et al., Mar. 5, 1985, 85-1 CPD ¶ 274, aff'd sub nom Woodward Associates, Inc.--Reconsideration, B-218348.2, Apr. 11, 1985, 85-1 CPD ¶ 415. In this case, section (c) of the standard late submissions clause incorporated by reference in the solicitation provides that any modification to a proposal resulting from the contracting officer's request for best and final offers received after the time and date specified in the request will not be considered, unless it is received before award and the late receipt is due solely to mishandling by the government after receipt at the government installation. Federal Acquisition Regulation, 48 C.F.R. § 52.215-10 (1985).

Before we can consider the question of government mishandling after receipt, however, the time of receipt at the installation must be established. DPER Corp., B-213429, Feb. 27, 1984, 84-1 ¶ 241, aff'd July 31, 1984, 84-2 CPD ¶ 134. Potomac has not shown, or for that matter even alleged, that it tendered its third best and final offer on time or that there was government mishandling in the process of receipt. Rather, the protester merely suggests that its submission may have been tendered on time because the conversation between its president and the agency's procurement assistant could have lasted for up to 6 minutes. In this connection, however, we note that the protester admitted in its protest to the agency that its president was not "sensitive to the time," and that the agency said in denying that protest that the procurement assistant maintains the conversation was not lengthy and certainly did not last for 6 minutes. Moreover, the contracting officer's report indicates that the submission was not tendered until after the short conversation. Since the evidence here does not establish that the protester's third best and final offer was received at the government installation on time, there is no need to consider whether the submission was mishandled after receipt. We conclude that, consistent with the terms of the solicitation, the agency properly refused to consider the protester's third best and final offer.

We also agree with the agency that the protester's proposal without the June 21 submission failed to contain a definite commitment to comply with the required delivery

date, 120 days after award. Potomac's second best and final offer stated both that it would comply with the then 60-day delivery requirement and that it might not comply, depending on the success of the equipment manufacturer's modification effort. This hardly constituted a definite commitment to comply with a fixed delivery date, and was enough, in our view, to cause the agency to reject the proposal.

Finally, with respect to Potomac's questioning of Telegraphics' status as a regular dealer, this Office does not consider whether an offeror is a regular dealer or manufacturer within the meaning of the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to final review by the Small Business Administration where, as in this case, a small business is involved, and by the Secretary of Labor. Bogue Electric Mfg. Inc., B-210699, Feb. 22, 1983, 83-1 CPD ¶ 179. Our role in protests concerning the status of an offeror as a regular dealer or manufacturer is limited to considering whether the contracting officer has complied with procedural requirements. Kendall G. Peterson, B-208757.2, June 8, 1983, 83-1 CPD ¶ 624. Since Potomac has not alleged a failure to follow proper procedures, we dismiss this aspect of the protest. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(9) (1985).

The protest is denied in part and dismissed in part.

for Seymour Efron
Harry R. Van Cleve
General Counsel